UNITED MALAYAN BANKING CORPORATION BHD

v.

DATIN THERESAH ABDULLAH & ANOR (NO 2)

HIGH COURT MALAYA, MUAR
LOW HOP BING J
[CIVIL SUIT NO: 22(23)-7-1993]
21 FEBRUARY 1997

LIMITATION: *Administration action - Commencement of time for limitation period - Letters of administration granted - Period between death and grant of letters of administration - Whether time runs against creditor*

The High Court had ordered summary judgment for the plaintiff. The defendants succeeded in their appeal to set aside the summary judgment and the case is remitted back to the High Court to hear further submissions on the issue of limitation.

The material facts are that the plaintiff issued a first notice of demand to one Zakaria ('the deceased') not knowing that he had died before the date of issuance. Upon discovery of the death of the deceased, the plaintiff abandoned the suit filed pursuant to the first notice of demand. The plaintiff then issued the second notice of demand and filed the present suit against the 1st and 2nd defendants as administrators of the deceased's estate after the letters of administration had been granted to them.

The question is whether the present suit has been time-barred.

Held:

[1] A valid demand is a necessary ingredient for the purpose of enabling the creditor to found a cause of action against the guarantor. In a case involving a demand guarantee, the cause of action arises at the date of the demand.

[2] While an executor's title commences on the death of the testator, an administrator's title is nevertheless derived from the grant and does not relate back to the death. There is therefore no person capable of suing or being used as an administrator until a valid grant has been given.

[3] Time will not run against a creditor whose debt was payable after the debtor's death, until a grant of the letters of administration has been taken out to the debtor's estate.

[4] A right of action depending on an event which happens after a person's death intestate can only accrue to or against his estate at the date when the letters of administration are granted.

[5] Applying the law to the facts herein, time began to run against the plaintiff from the time the letters of administration were granted and expired at the end of six years from that date. The present suit was filed within that period and therefore was not time-barred.

[Application allowed.]

Case(s) referred to:
Bradford Bank Ltd v. Sutcliffe [1918] 2 KB 833 ***(refd)***
Chan Kit San v. Ho Fung Hang [1902] AC 257 ***(refd)***
Douglaus v. Forrest [1828] 4 Bing 685 ***(refd)***
Ingal v. Moran [1944] KB 160 ***(refd)***
Jollife v. Pitt 2 Vern 694 ***(refd)***
Murray v. East India Co [1821] 5B & Ald 204 ***(refd)***
Oomah Meida Hajee v. Moona Jana Shaik Allaudin & Ors [1932] 1 MLJ 128 ***(refd)***
Re Brown's Estate [1893] 2 Ch 300 ***(refd)***
Wee Kee Puan v. Overseas Chinese Banking Corp Ltd [1982] 1 MLJ 64 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a)
Probate and Administration Act 1959, s. 39
Rules of the High Court 1980, O. 14, O. 15 r. 6A(1), (3)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 20, para 195
John Weeks, MA QC, *Limitation of Actions*, 4th edn
Josling, *Period of Limitation*, p 24
Sunnucks, Martyn & Garnett, *Executors, Administrators and Probate*, 1993, p 900

For the plaintiff - Lathika Prabhakaran; M/s Chor Anwarul & Co
For the defendants - GF Nelson; M/s GF Nelson & Co

Reported by Yow Ting Fong

JUDGMENT

Low Hop Bing J:

Background

On 21 September 1994, pursuant to the plaintiff's application in encl. (14), I made an Order granting the plaintiff summary judgment under O. 14 of the Rules of the High Court 1980. The grounds of my judgment appear in [1994] 4 CLJ 1074-1083.

On 26 September 1994, the defendants lodged an appeal against the said order. The appeal was disposed off by the Court of Appeal on 7 August 1995. In allowing the appeal, the Court of Appeal directed that this matter to be remitted to me, as the judge hearing the said application, in order to hear further submissions on the issue of limitation only.

Further Submission For The Defendants

In the further submission advanced for the defendants, learned counsel canvassed that the present suit ie, Muar High Court CS. 22(23)-7-93 ("the present suit") against the 1st and 2nd defendants, as administrators to the estate of Dato' Zakaria Sulong ("Zakaria") issued on 14 February 1993, is really the second suit arising out of the same subject-matter, the first being Muar High Court CS. 23-14-87 ("the first suit") against, *inter alia*, Zakaria as the 2nd defendant arising out of a guarantee executed by Zakaria on 28 September 1984.

It was also submitted that, in the present suit, the letter of demand to the guarantor's administrators was issued on 17 April 1992 and the writ was filed on 14 February 1993. Hence, at first blush, it may appear that the action was filed timeously.

It was also pointed out for the defendants that the plaintiff had pleaded in the first suit that the plaintiff's solicitors had *vide* letter of demand dated 5 February 1987 made a demand ("first notice of demand"), *inter alia*, on Zakaria (who, unknown to the plaintiff or the plaintiff's solicitors, had passed away on 6 June 1985 ie, one year eight months before the first notice of demand) as 2nd defendant and as a guarantor and hence, according to the defendant's counsel, limitation should therefore be calculated from 5 February 1987, in which case, by the time the plaintiff filed the present suit on 14 February 1993, time bar has already set in.

Learned counsel for the defendants also argued that upon discovery of the death of the 2nd defendant, it was open to the plaintiff in the first suit to take advantage of O. 15 r. 6A(3) of the Rules of the High Court 1980 to substitute the deceased with a living person and to continue with the proceedings. Instead, they chose to abandon the unresolved first suit which was not taken to its logical conclusion and instead filed the present suit which is a fatal error on their part.

The plaintiff's solicitors, in the view of the defendant's solicitors, should be aware of the steps to take ie, to issue a valid notice of demand, using one of the following two means:

(a) resort to cl. 8 of the guarantee which expressly provides for the eventuality of death of guarantor;

or

(b) alternatively, refer to s. 39 of the Probate and Administration Act 1959 by serving the notice on the Official Administrator.

Further Submission For The Plaintiff

Learned counsel for the plaintiff submitted that this action is not time-barred on the following grounds:

(1) The first notice of demand to the guarantor dated 5 February 1987 was issued after the guarantor had died and was therefore invalid;

(2) Order 15 r. 6A(1) of the Rules of the High Court 1980 and s. 39 of the Probate and Administration Act 1959 do not apply;

(3) The cause of action involving the 1st notice of demand arose only after death;

(4) Time began to run upon the grant of the letters of administration.

Decision Of The Court

With a view to having a proper perspective in the present suit, I propose to set out the chronology of events as follows:

Date	Event
28 September 1984	The guarantee was executed by Zakaria ("the deceased") and four other guarantors.
6 June 1985	The deceased died.
*5 February 1987	The plaintiff issued the first notice of demand to the deceased, not knowing that he had died.
28 February 1987	The plaintiff filed an action against, *inter alia*, the deceased but subsequently abandoned the action against the deceased.
#20 April 1988	Letters of administration of the estate of the deceased were granted to the 1st and 2nd defendants.

	**17 April 1992	The plaintiff issued the second notice of demand to the 1st and 2nd defendants.
	14 February 1993	The present suit, which is based on the 2nd notice of demand, was filed.

* Period between 5 February 1987 and 14 February 1993: Six years and ten days.

** Period between 17 April 1992 and 14 February 1993: Nine months and 28 days

\# Period between 20 April 1988 and 14 February 1993: Four years nine months and 26 days.

Since the present suit is founded on a contract, the relevant limitation period is six years from the date on which the cause of action accrued: Limitation Act 1953, s. 6(1)(a). In my view, the present suit is not time-barred. In the first place, the first notice of demand dated 5 February 1987 was issued after the deceased had died and was therefore invalid. A valid demand is a necessary ingredient for the purpose of enabling the creditor to found a cause of action against the guarantor: *Halsbury's Laws of England*, 4th edn, vol. 20, para 195 and the cases cited thereunder.

Clause 1 of the guarantee makes a demand on the guarantor necessary before any liability arises. On 5 February 1987, there was no legal person on whom the demand could be served. Letters of administration had not as yet been issued on 5 February 1987. There was and could be no compliance with cl. 1 of the guarantee on 5 February 1987.

Secondly, O. 15 r. 6A(1) of the Rules of the High Court 1980 upon which the defendants rely, does not apply, to the facts of this case, in particular reference to the first notice of demand. Order 15 r. 6A(1) provides as follows:

> Where any person against whom a cause of action would have lain has died but the **cause of action** survives, the action **may**, if no grant of probate or administration has been made, be brought against the estate of the deceased. (emphasis added).

Under the provision of O. 15 r. 6A(1), a creditor has a discretion whether to bring the action forthwith against the debtor or wait until the grant is made. In any event, this provision applies to the filing of actions in court; it does not validate invalid notices of demand. In the circumstances, it has no application to the service of a notice of demand such as the first notice of demand in the instant case. Further, O. 15 r. 6A(1) only applies where

the cause of action arose prior to the death of the deceased and "survives" even after the death. In a case involving a demand guarantee, the cause of action arises at the date of the demand: *Re Brown's Estate* [1893] 2 Ch 300, at 305-306; *Bradford Bank Ltd v. Sutcliffe* [1918] 2 KB 833 at 840-841, 843-844, 848-849; and *Wee Kee Puan v. Overseas Chinese Banking Corp. Ltd.* [1982] 1 MLJ 64, at p. 65.

In any event, O. 15 r. 6A(1) does not help the defendant's case because any cause of action arising from the 1st notice of demand arose after and not prior to the death of the deceased.

Thirdly, time began to run upon the grant of letters of administration ie, 20 April 1988. While an executor's title commences on the death of the testator, an administrator's title is nevertheless derived from the grant and does not relate back to the death: *Ingal v. Moran* [1944] KB 160. There is therefore no person capable of suing or being used as an administrator until a valid grant: *Chan Kit San v. Ho Fung Hang* [1902] AC 257 (See John Weeks, MA, QC on *"Limitation of Actions"*, 4th edn. Longman p. 9). The Privy Council decision in *Chan Kit San*'s case, *supra*, was followed by Terrell J in *Oomah Meida bt Hajee v. Moona Jana Shaik Allaudin and Others* [1932] 1 MLJ 128, at 130.

It seems that time will not run against a creditor whose debt was payable after the debtor's death, until a grant of letters of administration has been taken out to the debtor's estate: *Jollife v. Pitt* 2 Vern. 694 as quoted in Sunnucks, Martyn & Garnett, on *"Executors, Administrators and Probate"*, 1993, London, Stevens and Sons at p. 900.

As stated above, while an executor's title dates (subject to proof) from the testator's death, the title of an administrator is derived solely from the grant. Thus, a right of action depending on an event which happens after A's death intestate, can only accrue to or against his estate at the date when letters of administration are granted: *Murray v. East India Co.* [1821] 5B & Ald. 204, quoted by Josling on *"Period of Limitation"* Longman at p. 24. *Murray*'s case, *supra* was cited with approval in *Douglaus v. Forrest* [1828] 4 Bing 685, 130 ER 933, 940.

In the light of the above authorities, it is trite law that in the application of s. 6(1)(a) of the Limitation Act 1953, time does not begin to run until the letters of administration have been granted in respect of the estate of the deceased, which, in the instant case, is 20 April 1988.

Applying the law to the facts herein, I hold that time began to run against the plaintiff on 20 April 1988 and expired on 19 April 1994. The present suit was filed on 14 February 1993 ie, before 19 April 1994 and therefore is not time-barred.

In this connection, s. 39 of the Probate and Administration Act 1959 is not relevant as it touches on the vesting of the deceased's movable and immovable property and not on the validity of the service of a notice of demand: *Chan Kit San v. Ho Fung Hang (supra).*

Finally, even if the 1st notice of demand is found to be valid, the plaintiff was entitled to issue the second notice of demand. The first and second notices of demand gave rise to separate causes of action. The present suit involves a cause of action which arose from the issue of the second notice of demand on 17 April 1992. Time therefore runs against the plaintiff from the date of the second notice of demand.

In the circumstances, I allow the plaintiff's application to enter summary judgment against the defendants herein, with costs.